

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KELLY BOLDING, *et al.*,

Plaintiffs,

v.

BANNER BANK,

Defendant.

CASE NO. 2:17-cv-00601-RSL

ORDER GRANTING CLASS
COUNSELS' MOTION FOR
ATTORNEY'S FEES, COSTS, AND
CLASS REPRESENTATIVE
INCENTIVE AWARDS

This matter comes before the Court on "Plaintiffs' Motion for Attorney's Fees and Costs and Class Representative Service Awards." Dkt. # 382. Having reviewed the submissions of the parties and heard the arguments of counsel, the Court finds as follows:

(1) Attorney's Fees

The parties agreed to settle the above-captioned lawsuit for a maximum payment of \$15,000,000, inclusive of all fees, costs, and disbursements to class members. Class counsel has requested an attorney's fee award of 33% of that amount, or \$5,000,000. A 33% award (which corresponds with a 1.399 lodestar multiplier) is appropriate in this case.

This Circuit permits two methods of calculating attorneys' fee awards in class actions: (1) the "lodestar" method and (2) the "percentage-of-recovery" method. Under the lodestar method, the court multiplies the number of hours the prevailing party reasonably spent on litigation by a reasonable hourly rate to determine a presumptively reasonable fee award. The court may then

1 adjust the award by an appropriate positive or negative multiplier reflecting
2 the quality of representation, the benefit obtained for the class, the
3 complexity and novelty of the issues presented, and the risk of nonpayment.
4 Benefit to the class is the foremost consideration. This method is especially
5 appropriate in class actions where the relief sought—and obtained—is
6 primarily injunctive.

7 The percentage-of-recovery approach may be used where the defendants
8 provide monetary compensation to the plaintiffs and class benefit is easy to
9 quantify. Under this method, the court simply awards the attorneys a
10 percentage of the fund sufficient to provide class counsel with a reasonable
11 fee.

12 *Kim*, 8 F.4th at 1180–81 (internal quotation marks, citations, and alterations omitted). The
13 lodestar calculation results in a presumptively reasonable award of \$3,572,529.25 in this
14 case. Class counsel requests, and the Court approves, a multiplier of 1.399. The
15 representation of the class was dogged, skilled, unwavering, strategic, and thorough
16 throughout seven years of hard-fought litigation. Each class member stands to recover
17 thousands, if not tens of thousands, in unpaid overtime wages, and the litigation prompted
18 2017 changes in defendant’s practices and procedures that improved the chances that class
19 member work would be recorded and compensated. The case involved a Fair Labor
20 Standards Act collective action and a Rule 23 class action, class members in multiple
21 states, merging corporate entities, spoliation issues, significant discovery disputes, the
22 bifurcation of the liability and damages issues, and an open question regarding the
23 calculation and proof of damages. Counsel fronted all of the costs and thousands of hours
24 to develop the class claims and bring this case to a settlement, all with the very real risk of
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1 failure and/or a damage award that could not justify the recovery of the fees incurred. The
2 settlement itself was hard-fought, with no evidence of collusion and a consistent regard for
3 the best interests of the class. The requested multiplier of 1.399 is modest in light of the
4 work done, the risks overcome, and the relevant case law.

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6 Under the percentage-of-recovery approach, an award above the Ninth Circuit
7 benchmark of 25% is similarly warranted by the circumstances of the case. In the face of
8 defendant's vigorous opposition to certification, attempts to disqualify counsel and a class
9 representative, and spoliation of evidence that was relevant to both liability and damages,
10 class counsel achieved an exceptional result for the class, including payments for 5-10
11 hours of overtime for the weeks each class member worked during the limitations period.
12 This result was not pre-ordained. Counsel had to overcome the significant holes in the
13 evidence regarding hours worked and to present a viable class theory of liability and
14 damages, all while fronting millions of dollars in fees and costs and declining other work
15 in the interim. In addition, the litigation generated benefits to the class that are not captured
16 in the cash settlement the members will receive. Finally, the retainer agreements between
17 counsel and the named plaintiffs promising to pay counsel 40% of any recovery and the
18 lodestar cross-check show that a 33% fee is standard and reasonable for this type of
19 contingency case.

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21 Having found that a 33% recovery and a 1.399 lodestar multiplier are appropriate in
22 the circumstances presented here, the Court must address defendant's suggestion that the
23 \$15,000,000 settlement is actually worth less than that to the class, warranting a fee award
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1 of something less than \$5,000,000. As described by the parties, some portion of the
2 settlement fund will be automatically distributed to class members under categories named
3 “FLSA share” and “Non-FLSA Pre-Net Share.” Another portion, called the “Non-FLSA
4 Post-Net Share” will be disbursed only if the class members affirmatively verify that they
5 worked unpaid hours after defendant altered its policies and practices to encourage
6 accurate reporting. The amounts available in each of these three categories varies inversely
7 with the amount of the attorney’s fee award: the more of the settlement fund that goes to
8 fees, the less there is to be distributed under the “FLSA share,” Non-FLSA Pre-Net Share,”
9 and “Non-FLSA Post-Net Share” categories.
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12 The Ninth Circuit recently clarified that when evaluating the reasonableness of an
13 attorney’s fee award, the Court “must consider the actual or realistically anticipated benefit
14 to the class – not the maximum or hypothetical amount – in assessing the value of a class
15 action settlement.” *Lowery v. Rhapsody Int’l, Inc.*, 75 F.4th 985, 992 (9th Cir. 2023). *See*
16 *also Kim v. Allison*, 8 F.4th 1170, 1181 (9th Cir. 2021)). In *Lowery*, the parties negotiated a
17 settlement under which Rhapsody promised to pay up to \$20 million to the class on a
18 claims-made basis. At the time, the parties were aware that an industry group had already
19 reached a settlement with copyright owners regarding the same copyright claims at issue,
20 “effectively decimating” the class Lowery was attempting to represent. *Id.* at 989. “In the
21 end, Rhapsody paid only \$52,841.05 to satisfy class members’ claims.” *Id.* at 990. The
22 Ninth Circuit reversed a fee award of \$1.7 million finding that it was unreasonable given
23 the limited benefits obtained by the class.
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1 In this case, there is no indication that there was any known or suspected obstacle to
2 class members' participation in the settlement, and the amount of money paid out to the
3 class exceeds that going to class counsel under any of the scenarios discussed by the
4 parties. Class counsel has made extraordinary efforts to ensure that eligible class members
5 were aware of and participated in the claims process, going so far as to email and/or text
6 all of them and speaking to most of the members on the phone. Ultimately, 83.5% of the
7 claim-required fund has been claimed, and the other two funds will be distributed
8 automatically. If, as defendant posits and plaintiffs appear willing to accept, a \$5,000,000
9 fee award results in a potential for claims-based payouts in the amount of \$5,554,070, an
10 83.5% disbursement would leave \$916,421.55 of the "Non-FLSA Post-Net Share" in the
11 kitty. If the Court were to assume that this amount does not benefit the class, it might, in its
12 discretion, calculate the attorney's fee award on a reduced common fund of
13 \$14,083,578.40. But these numbers are all based on a \$5 million fee award. Changing that
14 number at the end of the process either erodes the anticipated benefits to the class by
15 reducing the total amount paid by defendant or creates a calculation loop where a reduction
16 in the fee award from \$5 million to \$4,647,581 results in an increase in the potential "Non-
17 FLSA Post-Net Share" (*see* Dkt. # 386 at 9-10). The dollar amount representing 83.5% of
18 that newly-calculated share would then increase,¹ which would require an increase in the
19 fee award to maintain the 33% rate, followed by further adjustments to the potential
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26 ¹ The amount available to be paid to class members increases on a dollar-for-dollar basis as the amount paid in attorney's fees decreases (and vice versa).

1 claims-based share, the actual payments, and the fee award. The adjustments would
2 eventually become vanishingly small, but the entire exercise is unnecessary and unhelpful.

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4 The parties negotiated a common settlement fund out of which both the class
5 members and their counsel will be paid. The reasonably anticipated benefit of the
6 settlement includes payment for the legal services that were required to create the
7 settlement fund, thereby releasing class members from any equitable (or contractual) duty
8 to pay for those services. Where, unlike in *Lowery*, there are no extraordinary obstacles to
9 class participation, there was no reason to suspect that the maximum settlement fund value
10 was artificially inflated, the vast majority (over 93%) of the settlement fund will, in fact, be
11 distributed, and the resulting fee award is reasonable under both the lodestar and
12 percentage-recovery approaches, further adjustment to the fee award is not warranted.
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15 The Court finds that an attorney's fee award of \$5,000,000 is justified in this case.

16 **(2) Litigation Expenses**

17 Class counsel has incurred, and the Court hereby awards, \$303,084.08 in reasonably
18 litigation expenses.
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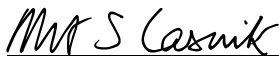
20 **(3) Service Awards**

21 The class representatives have played an integral part in both the development of
22 the class claims and providing proof thereof. In a tightly-knit and competitive industry,
23 they were willing to call out their employer for creating a culture in which work went
24 uncompensated, not only risking their ability to find employment, but having to fend off
25 discovery aimed at their current employers. The Court finds that an award of \$20,000 each
26 will provide compensation to the class representatives for the years of service provided and

1 the reputational risk they undertook without undermining the adequacy of their
2 representation.

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4 For all of the foregoing reasons, plaintiffs' motion for an award of \$5,000,000 in
5 attorney's fees, \$303,084.08 in litigation expenses, and \$20,000 for each of the three class
6 representatives is GRANTED.

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8 Dated this 23rd day of February, 2024.

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11 Robert S. Lasnik
12 United States District Judge
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